76-1427

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLEE
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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	i
Questions Presented	1
Statement of the Case	2
Argument	3
Conclusion	21

Table of Authorities

Cases Cited:

Braunfeld v. Brown, 366 U.S. 599	5, 7, 8, 21
Cox v. United States, 332 U.S. 442	15
De Funis v. Odergaard, 416 U.S. 312	18
Dickinson v. United States, 346 U.S. 389	15
Dunn v. Blumstien, 405 U.S. 330	12
Ellis v. Dixon, 349 U.S. 458	21
Everson v. Board of Education, 330 U.S. 1	9
Flast v. Cohen, 392 U.S. 83	10
Golden v. Zwickler, 394 U.S. 103	20
Harris County Commissioners v. Moore, 420 U.S. 77	15

Jenness v. Fortson, 403 U.S. 431 12

Lawrence v. State Tax Commission, 286 U.S. 276 21

Lubin v. Panish, 415 U.S. 709 12

Paty v. McDaniel, SW 2d 897 .....3, 5, 7, 19

School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 .....5, 6, 9

Sherbert v. Verner, 374 U.S. 398 ..... 5, 7

Storer v. Brown, 415 U.S. 724 12

Torcaso v. Watkins, 367 U.S. 488 16

Trans World Airlines v. Hardison, — U.S. —, 97 S. Ct. 2264 6

Turner v. Fouche, 396 U.S. 346 12

Williams v. Rhodes, 393 U.S. 23 .....11, 12

Constitutional Provisions Cited

Constitution of the United States:

Article I, Section 2 6

Article I, Section 3 7

Article I, Section 6 7

Article II, Section 1 7

Constitution of Tennessee:

Article I, Section 3 17

Article I, Section 4 17

Article IX, Section 1 .....3, 5, 15, 16, 17

Statutes Cited

Public Acts of Tennessee—1976:

Chapter 848, § 4 3

Chapter 848, § 8 17-18

26 United States Code:

§ 107 13

§ 1402(a) 13

§ 3401(a)(9) 14

50 United States Code:

§ 456(g) 13

Other Citation:

Appellant's Jurisdictional Statement 7, 9, 10, 19

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On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLEE
Selma Cash Paty

QUESTIONS PRESENTED

I

Does the Legislative Call for the Constitutional Convention, 1976 Public Acts of Tennessee, Chapter 848, Section 4, Violate First Amendment Provisions of the United States Constitution Concerning the Free Exercise of Religion?

II

Does the State Statute Violate First Amendment Provisions of the United States Constitution Concerning Establishment of Religion?

III

Does the State Statute Violate Fourteenth Amendment Provisions of the United States Constitution Concerning Equal Protection of the Laws?

IV

Does the State Statute Violate Fourteenth Amendment Provisions of the United States Constitution in Denying Due Process by Being Vague?

V

Does the State Statute Amount to a Religious Test as a Condition to Holding Office?

VI

Is the Question Presented by This Appeal Now Moot?

STATEMENT OF THE CASE

This is an appeal from a decision of the Supreme Court of Tennessee rejecting appellant's contention that his disqualification pursuant to Tennessee State Law as a delegate to the Tennessee Limited Constitutional Convention is a denial of his Federal Constitutional rights to free exercise of religion, is an establishment of religion in conflict with the First Amendment, is a denial of his right to vote, is a violation of Equal Protection of the Laws, is based upon an unconstitutionally vague law, and subjects him to a religious test in order for him to qualify as a candidate. The brief on behalf of appellee, Selma Cash Paty, answers the contentions of appellant in this order, and it raises the additional question of whether the case might not now be moot.

ARGUMENT

I

The Legislative call, Public Acts 1976, Chapter 848, Section 4, established qualifications for delegates to the Limited Constitutional Convention the same as those for membership in the Tennessee House of Representatives.

> "SECTION 4. Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district."

Article IX, Section 1 of the Constitution of Tennessee provides as follows:

> "Section 1. Ineligibility of ministers and priests to seats in legislature.—Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

The Tennessee Supreme Court found in *Paty v. McDaniel*, 547 S.W. 2d 897, that service in the legislature is "purely secular activity", and this brief adopts the position that there is no limitation on the free exercise of religion imposed by Article IX, Section 1. Service in the Tennessee Legislature cannot be considered to be a right to free exercise of religion guaranteed by the First Amendment under the facts of this case. There is no allegation in the record of this case to indicate that appellant intends now, or ever, to leave his ministry because of

his desire to serve as a delegate to the Limited Constitutional Convention or to become at some future time a candidate for a seat in either House of the Tennessee Legislature.

By appellant's testimony, it can be seen that, whatever burden appellant contends is imposed upon his free exercise, it is one that does not compulsively require the abandonment of any of his religious beliefs, which may well include being a minister of his faith but which, in the absence of proof in the record to support the claim, does not include being a convention delegate or member of the Tennessee General Assembly.

As the questioned statute relates to the exercise of his religion, appellant offered no testimony which would indicate that the statute inhibited the exercise of his religious prerogatives in the past, present or future. The testimony is lean, but it illustrates the contrary to a valid "free exercise" complaint:

> Q. "And do you intend to resign as a minister of the gospel if you were to be elected?
>
> A. No . . .
>
> A. I have no intention to resign from the congregation."
>
> (Bill of Exceptions, page 8.)

Appellant's candidacy as a convention delegate was not shown in the proof to have been dictated by the tenets of the Missionary Baptist faith or to have been the result of a privately inspired or personally held religious conviction. Appellant's choice to have become a candidate for election, not having been made in response to some religious stimulus, does not make a case for striking down this statute upon the strength of a free exercise challenge, presenting as it does in this case a theoretical question which does not exist in fact.

This Court has previously stated that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203. It should be emphasized that if appellant's challenge is to succeed on free exercise grounds, the burden is upon him to show the coercive effect of the law *in his religion*. It was expressly found by the Supreme Court of Tennessee in *Paty v. McDaniel, supra*, that if any burden can be said to exist on the exercise of religion, "it is indirect, miniscule, and does not make unlawful any religious practice." 547 S.W. 2d at 905.

The degree of the burden upon the free exercise of religion should be actual rather than theoretical in order for a First Amendment challenge to be upheld, and the characterization as an "indirect" burden does little to clarify whether the Tennessee Constitution, Article IX, Section 1 is an impermissible one. A definition of "indirect burden" in the context of free exercise clause cases was supplied by Chief Justice Warren in *Braunfeld v. Brown*, 366 US 599, as "legislation which does not make unlawful the religious practice itself." 366 US at 608. There are, admittedly, indirect burdens which have been found to inhibit the free exercise of religion to the extent that the questioned legislation unconstitutionally conflicted with First Amendment rights; however, these successfully challenged state actions were not found to have been sufficiently grounded upon such a compelling state interest as to warrant the inhibition of free exercise of religious rights.

Such a case is *Sherbert v. Verner*, 374 U.S. 398, which decided upon free exercise grounds that a Seventh-Day Adventist was not ineligible for benefits under South Carolina's unemployment compensation law because of her unavailability for work on Saturdays. The Court found that conditioning the receipt of benefits upon the "appellant's willingness to violate a cardinal principal of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 US at 406. However,

this factual situation is not analogous to appellant's case because the exigencies of survival demand that a member of our society have an income whether in the form of earnings or other compensation whereas service in the legislature is a voluntary activity which involves no element of coercion.

The rule which appellant would have this Court adopt is that *any* burden on the free exercise of religion whether those burdens are real or merely potential violates First Amendment rights. Yet, in the recent case of *Trans World Airlines v. Hardison*, — U.S. —, 97 S.Ct. 2264, the Court decided that an employer has a duty under the Civil Rights Act to make "reasonable accommodations" to the religious needs of its employees. Congress recognizes by including a standard of reasonableness into Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, that the right to exercise one's religion is not absolute, and by deciding the case on grounds other than those involving the question of free exercise of religion, the Court also recognizes that there are permissible legislative burdens which can be placed on the right.

If the Tennessee Supreme Court's decision is to withstand apppellant's constitutional challenge, it must be either because appellant's disqualification from candidacy is not an infringement by the State of his constitutional rights of free exercise, or "because any incidental burden on the free exercise of appellant's religion must be justified by compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *School District of Abington v. Schempp*, 374 US at 403. Political candidacy is unquestionably a subject within the state'e power to regulate, indeed the Constitution of the United States established certain qualifications for candidates for election to public office. Representatives must be 25 years of age, a citizen for 7 years and an inhabitant of the State from which he or she is chosen. (Article I, Section 2). A senator must be 30 years of age, a citizen for 9

years and an inhabitant of that state. (Article I, Section 3). No person holding any office under the United States may be a member of congress. (Article I, Section 6). Only natural born citizens may serve as President of the United States. (Article II, Section 1).

The Tennessee Supreme Court found that,

> "The effect of Tennessee's constitutional provision prohibiting service in the General Assembly is to advance the State's goal of maintaining the separation between church and state, an imperative, constitutionally equal to the free exercise mandate. In our opinion, it is far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day, which sufficed in *Braunfeld*." *Paty v. McDaniel*, 547 S.W. 2d at 905.

A compelling state interest is to preserve the neutral governmental attitude toward religion which the Establishment Clause was intended to promote. Appellant argues that "no state interest in a 'wall of separation' which diminishes federal rights of free exercise is compelling." (Appellant's Jurisdictional Statement, page 8). The case of *Braunfeld v. Brown, supra*, decided precisely otherwise, holding as it did that there was a state interest in having a uniform day of rest in the state sufficiently compelling to permit the enforcement of Sunday closing laws to the admitted detriment of members of religious groups observing a Sabbath day other than Sunday, the religious observance of which is a federally guaranteed right.

On the other hand, in *Sherbert v. Verner*, the Court was not persuaded by the compelling state interest argument that unscrupulous claimants would feign religious objections to Saturday employment in order to avail themselves to the unemployment compensation fund because, in part, the objection had not

been made in the state supreme court, and the Court was "unwilling to assess the importance of an asserted state interest without the views of the state court." 374 US at 407. Where, as here done by the Tennessee Supreme Court, the highest court of a state has approved a constitutional provision of that state unchallenged and unaltered for 180 years, its decision should not be disturbed without employing "the most critical scrutiny" in order to avoid radically restricting a state's legislative latitude. *Braunfeld v. Brown, supra.*

A workable test for determining the validity of laws in conflict with the free exercise clause was employed in *Braunfeld v. Brown,*

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." 366 US at 607.

It is submitted, and the Tennessee Supreme Court found, that having ministers of any faith serve in the legislature would undermine the "compelling state interest" in prepetuating the First Amendment policy of maintaining the wall of separation of church and state by insuring that members of the legislature are not professionally concerned with an established religion. By inference from the *Paty v. McDaniel* decision, the Tennessee court found that the nature of the call of a minister is to lead and teach the members of a particular religious group and to foster the precepts and doctrines of that group to which he is primarily devoted.

It is a permissible distinction between members of the ministerial profession and members of any other profession because of the reasonably foreseeable conflict between a minister's divinely influenced mandate in the promotion of his religious views and the prohibition of the Establishment Clause. The policy sought to be perpetuated was stated in *Everson v. Board of Education,* 330 U.S. 1, as preserving civil liberty by rescuing "the temporal institutions from religious interference." The dual aspect of the constitutional inhibition in the area of legislation in matters of religion, operating as it does to maintain the wall of separation of church and state, affords self-protection to both institutions.

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Board of Education,* 330 U.S. at 16.

It is plain that religious intrusion into the governmental sphere, as observed by this Court in *Abington School District v. Schempp, supra,* would ultimately have the same coercive effect as governmental interference with religion, indirectly compelling religious minorities to conform to the prevailing officially approved religion. Appellant argues that the apprehensions of the Tennessee Court that the candidacy of ministers to the legislative body in the state would result in a political cleavage along religious lines is unwarranted. (Appellant's Jurisdictional Statement, p. 20.) However, this Court has expressed the same type of apprehension concerning the combination of government and religion in *Abington School District v. Schempp, supra*:

> "The wholesome 'neutrality' of which the Court's cases speak this stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official

support of the State or Federal Government would be placed behind the tenets of one or all of the orthodoxies." 374 U.S. at 222.

II

Appellant's claim that this state action is an establishment of religion exists only theoretically, and appellant has not demonstrated how rights peculiar to him are adversely affected in respect to an establishment of religion. He is the only party before the Court claiming the infringement of constitutional rights, and the nature of his claim is not based upon a factual circumstance giving rise to any injury to him or an infringement of his fundamental rights by state action in the area of establishment of religion. There is lacking in the basis of appellant's claim "a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 102.

Appellant states in this brief that "the purpose of the draft exemption [pertaining to ministers] is to enhance free exercise of religion in the United States—to "guard against a flock being without its shepard (*sic*)", citing *Fitts v. United States*, 334 F. 2d 416, and that "the exclusion of the rental value of the parsonage enhances the free exercise of religion by in much the same way as the draft exemption approved by the Fifth Circuit in *Fitts*—it enhances the accessibility of the clergy to their parishioners." (Brief for Appellant, p. 7).

It seems obvious that the same reasoning upon which appellant relies in his brief is contrary authority for the proposition that the exclusion of clergy as constitutional convention delegates is an establishment of religion. If it is permissible to enhance the free exercise of religion by giving a draft exemption or a tax exemption so that the clergy is more accessible to its congregation, it seems to be equally permissible to provide this same accessibility by exempting the clergy in the manner of the statute in question.

Appellant's argument is that establishment of no religion is as prohibited as establishing religion itself; however, the historical context of the Federal Constitutional prohibition against establishment of religion contemplated the establishment of one particular faith to the detriment and expense of others. However, appellant's reliance on the draft and tax exemption situations seems not to be subject to the claim that they are establishment of religion and by logical analogy nor should the Tennessee statute in question.

III

Appellant contends that he has been denied Equal Protection in that he has been deprived of federally secured rights of voting and political candidacy as a result of the decree of the Tennessee Supreme Court.

The prevailing standard for determining the constitutional limits of a state's power over its own elections involves consideration of the "facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30. The classification of ministers as it applies to delegates to the Tennessee Constitutional Convention is a permissable one because the classification exists for the protection of an important state interest. The maintenance of a government free from the threat of religiously sectarian influence which might reasonably result in the establishment of religion, is a fundamental constitutional principal of the First Amendment and an important state interest, the promotion of which possibly involves the infringement to some degree of other valid fundamental rights of individuals.

Where the balancing of these competing state interests and individual rights involves the classification of individual groups and results in the asserted loss of fundamental rights, certain

tests have been formulated to determine if state action violating the Equal Protection Clause is permissible. The application of these tests involves looking to "the character of the classification in question; the individual interest affected by the classification and the governmental interest asserted in support of the classification." *Dunn v. Blumstien*, 405 U.S. 330, 335. A compelling state interest must be demonstrated in order for the classification to be constitutionally permissible where it infringes upon a constitutionally protected right, and without regard to whether any less stringent test may be applicable appellee contends that a compelling state interest has been demonstrated. The state interest in maintaining separation of church and state in this case is certainly more compelling than in having a uniform day of rest as in *Braunfeld v. Brown, supra*.

This state interest is of such magnitude as to distinguish this case from those cited by appellant dealing with filing fees, property requirements or minority parties, where the Court was unable to discern any significant state interest. See, *Lubin v. Panish*, 415 U.S. 709 (state interest eliminating frivolous candidates did not justify filing fee); *Turner v. Fouche*, 396 U.S. 346 (no justifiable state interest in freeholder qualifications for school board elections); *Williams v. Rhodes, supra* (no compelling state interest in restricting the ability of a minority party to gain a position on the ballot). Unlike these cases which involved protection of the rights of freedom of association directly affecting indigents, the arguable infringement in this case applied to a class upon whom it has not been demonstrated to have any substantial impact.

Other cases have found a compelling state interest in legislation placing limitations upon the elective process, acknowledging that "the state's strong interest in maintaining the integrity of the political process" outweighed any restrictions imposed upon the right to vote. *Storer v. Brown*, 415 U.S. 724, 731. In *Jenness v. Fortson*, 403 U.S. 431, for example,

the Georgia requirement that independent voters file a nominating petition signed by five percent of the electorate was upheld as reasonably related to the state's interest in the elective process.

The classification of which appellant complains is not an "invidious" one subject to constitutional challenge. The classification of ministers has been the subject of favorable class legislation in other contexts under both the Tennessee State law and under the federal law. One example was the exclusion of ministers from the draft under the Selective Service Act of 1967, 50 U.S.C. Section 456(g):

> "Regular or duly ordained ministers of religion, as defined in this title . . ., and students preparing for the ministry under the direction of recognized churces or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service but not from registration—under this title."

Ministers have also been given specific exemptions from taxation for certain types of income.

> 26 U.S.C.A. § 107. Rental value of parsonages in the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.
>
> 26 U.S.C.A. § 1402. (a) Net earnings from self-employment.—The term 'net earnings from self-employment'

means the gross income derived by an individual from any trade or business carried on by such individual . . . except . . . (8) an individual who is duly ordained, commissioned, or licensed minister of a church or a member of a religious order shall compute his net earnings from self-employment derived from the performance of service described in subsection (c) (4) without regard to Section 107 (relating to rental value of parsonages), Section 119 (relating to means and lodging furnished for the convenience of the employer), Section 911 (relating to earned income from sources without the United States), and Section 931 (relating to income from sources within possession of the United States).

26 U.S.C.A. §3401. (a) Wages.—For the purposes of this chapter, the term 'wages' means all remuneration . . . for services performed by an employee for his employer, . . . except that such term shall not include remuneration paid

—

(9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

It is submitted that if a classification of ministers is not unconstitutionally arbitrary or invidious for the purpose of the statutes cited above, then that classification does not violate the Equal Protection Clause as applied to the Tennessee Constitution. Nor, is this arbitrary class legislation any more than the preventing a federal judge from being a member of the United States Congress under the United States Constitution, Article I, Section 6, is arbitrary class legislation. There is, of course, a legitimate and compelling state interest in maintaining the separation of powers by barring judges from service in the legislature, but this does not rank higher on the scale of legitimate state interests than separation of church or state.

IV

Appellant raises a challenge to the decision below on the basis that the words "minister" and "priest" in the Tennessee Constitution, Article IX, Section 1, are unconstitutionally vague. As demonstrated by the Internal Revenue Code, the federal government has had no difficulty with the definition, and this terminology has not proven to be judicially unmanageable in the past.

Appellant's challenge to the vagueness of the section involves the application of Article IX, Section 1, and not its effect. It should be assumed that the Tennessee courts are able to define the term and to determine applicability as it relates to actual cases where the definition of the terms relate to real issues rather than to hypothetical situations. The Tennessee courts are certainly as equal to the task as the federal courts have been in construing the term "ministers" in such cases, for example, as *Dickinson v. United States*, 346 U.S. 389, and *Cox v. United States*, 332 U.S. 442.

Appellant raises no claim that the term "minister" is vague as it applies to him, and states in his own testimony the following:

Q. "And what is your profession?

A. I am a minister."

(Bill of Exceptions, p. 3.)

Hypothetical applications of the word "minister" are of intellectual interest only and are evasive of the issue of whether the section applies in the present situation. As this Court stated in *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 86 fn 9, "it is not the sort of vagueness that leaves those subject to a statute uncertain about what is required of them." The Court further states that "[i]n the case where applicability of the statute is uncertain, abstension is proper." Id.

V

Appellant claims that the requirements for service as a delegate to the Tennessee Limited Constitutional Convention amount to a religious test in violation of Article VI, Clause 3 of the Federal Constitution. The language of Article VI, which states that "no religious test shall ever be required as a qualification to any office or public trust under the United States," is limited in its application to positions in the Federal Government. The application of this section to the states by way of the First and Fourteenth Amendments to the Constitution may have been answered in *Torcaso v. Watkins*, 367 U.S. 488; however, it seems more likely that this decision striking down Maryland's requirement of an oath of affirmance in the belief of God as a condition to holding public office was decided on First Amendment grounds alone.

Appellee contends that the *Torcaso* case is not analogous to the case under examination here because the prohibition against the service of the clergy as constitutional convention delegates is not a religious disqualification but is a professional one. It is conceivable that a group could be organized which is anti-religious, which believes in no divine being and which has ministers similar to those of other organized religious faiths. By the terms of the disqualifications under examination here, ministers of these groups also would not be permitted to serve as delegates with regard not to their belief in God but with regard to their professional standing.

The State of Tennessee in adopting Article IX, Section 1, of its constitution recognized that this was a professional disqualification as contrasted to a religious one as can be seen by the fact that it exists alongside with Tennessee Constitution, Article I, Section 4, which provides as follows:

> "That no political or religious test, other than an oath to support the Constitution of the United States and of this

> State, shall ever be required as a qualification to any office or public trust under this State."

The co-existence of these two provisions of the Tennessee Constitution give strong evidence that there is no conflict between them in purpose, intent and effect. Article I, Section 4 serves to promote religious freedom in Tennessee by forbidding religious tests as a condition to holding public office, and Article IX, Section 1 promotes the same goal by closing the avenue for a professional concern with an organized faith to destroy the separation between church and state which the Tennessee Constitution also seeks to construct in Article 1, Section 3, which provides as follows:

> "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."

VI

The existence of a "case" or "controversy" within the meaning of Article III, Section 2 of the Federal Constitution is an indispensable requirement to the exercise of the jurisdiction of federal courts, providing as it does that:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution."

By virtue of the stay order which was issued by this Court on July 6, 1977, appellant was seated as a delegate to the Tennessee Limited Constitutional Convention. By the express provisions of 1976 Tennessee Public Acts, Chapter 848, Section 8,

the convention shall not have the power to meet beyond July 31, 1978, and the great likelihood is that the work of the convention will have concluded and the convention itself will have adjourned permanently before that date.

> "Section 8. The final action of the convention with respect to the alteration, reformation, abolishment or amendment of the sections and the subject matter of the Constitution of Tennessee as set out in this act shall be duly certified by the president and secretary of the convention and the original certified copy shall be transmitted to the Secretary of State for preservation among the official records of the state. The convention shall have no authority to meet beyond July 31, 1978."

In that event, the question presented here shall have become moot after the adjournment date. If the decision in this case is not reached before the adjournment date, the question would exist only in the abstract without relation to a situation where there is a demonstrable prejudicial application of 1976 Public Acts of Tennessee, Chapter 848. In fact, the law itself will cease to have validity after July 31, 1978 or the date of adjournment which ever is first to arrive.

This Court has held that "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them." *DeFunis v. Odergaard*, 416 U.S. 312 at 316. This appellee contends that there are no parties other than appellant, Paul McDaniel, who are before this Court in this case, the trial court and the Supreme Court of Tennessee having found that no legitimate class exists as to others than appellant and others as candidates for the limited constitutional convention called pursuant to 1976 Tennessee Public Acts, Chapter 848.

The posture of appellant's counter-claim after remand to the trial court were seen by the Supreme Court of Tennessee as follows:

> "Reverend McDaniel filed a counter-complaint, cross-complaint and third party complaint on October 21, 1976, following this Court's remand of the first appeal. The action was brought on behalf of himself and all other ministers of the gospel, all priests of any denomination whatever, present and future, (1) who wish to seek election as delegates to the 1977 constitutional convention or any future constitutional convention and (2) who wish to seek election as members of either body of the General Assembly of this State; and as a class action on behalf of himself and all independent voters who (1) wish to vote for delegates to the 1977 limited constitutional convention and all future constitutional conventions, (2) who wish to vote for candidates for election as members of the House or Senate and (3) who wish to vote for ministers of the gospel or priests of any denomination whatever in the November 2, 1976, election or any future election to a constitutional convention or to both bodies of the General Assembly of this state." *Paty v. McDaniel*, 547 S.W. 2d at 909.

The Chancellor in the Memorandum Opinion decreed that the appellant is eligible to be a candidate and to serve as a delegate to the constitutional convention along with "all other persons similarly situated composing this class." (Appendix D, "Jurisdictional Statement," p. 42). Whether there are others who as a class are entitled to relief was decided adversely to appellant by the trial court, and this portion of the decision was affirmed in *Paty v. McDaniel, supra*.

> "McDaniel seeks a further declaration by this court that ministers of the gospel are eligible to serve in the future as members of the Tennessee General Assembly. He alleges *"he may be a candidate for election* as a delegate in future elections for delegates to a subsequent constitutional convention as well as a candidate for election as a member of the Tennessee House of Representatives or Senate in future

elections." (Emphasis supplied in original.) (Appendix D, "Jurisdictional Statement," p. A 40).

The trial court found that it was "speculative and conjectural when and if again there will be a constitutional convention" and that "it is even more speculative as to whether the General Assembly in such a call would attempt to prevent ministers of the gospel from serving as delegates." (Appendix D, "Jurisdictional Statement," p. A 40).

The Supreme Court of Tennessee concurred in this result.

> "The Chancellor correctly held in his memorandum opinion that the issues raised on behalf of said classes do not present justicable controversies under the declaratory judgment statute because they are abstract, theoretical and based upon contingencies which may not arise. 547 S.W. 2d 909-910.

In *Golden v. Zwickler*, 394 U.S. 103, the Court said:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of act of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a district court, has jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*" (Emphasis added in original.) 394 U.S. at 110.

The existence of a definable class who are aggrieved by the law in question and to whom relief may be given was not found by the lower courts except for those in relation to the election for convention delegates on November 6, 1976. Until a new legislative call for a constitutional convention is established by

statute, the class will not again come into being. Whether it includes ministers or those wishing to vote for ministers is speculative, and until the question is again ripe it should remain unanswered. The finding by the lower courts of the lack of a legitimate class claim is an adequate and independent state ground of decision which does not amount to an evasion of the constitutional claim. *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932); this finding of the lower courts as to the existence of a valid class of voters rests upon an adequate non-federal ground which should not be subject to review. *Ellis v. Dixon*, 349 U.S. 458 (1955).

CONCLUSION

Appellant urges that the decision below be affirmed on the ground that the judgment rests upon the interpretation by the highest appellate court of the State of Tennessee of its own State's Constitution, and the decision is based upon the finding of a legitimate and substantial state interest.

This Court should find that the Tennessee Constitution, Article IX, Section 1, is free from constitutional infirmities, thereby permitting the State of Tennessee to promote in its own manner its own goals. Whether, in comparison with alternative means of promoting that state interest, this is the wisest means available should not be the scale by which this law is to be measured. For, as this Court states in *Braunfeld v. Brown, supra*, "our concern is not with the wisdom of legislation but with its constitutional limitations." 366 U.S. at 608.

Respectfully submitted,

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